U.S. Department of Labor

Office of Administrative Law Judges
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Date: May 12, 2000

Case No.: 1999-LHC-1304

OWCP No.: 07-146281

In the Matter of

CHARLES J. WASHINGTON

Claimant

v.

CON AGRA, INC.

Employer

APPEARANCES:

JAMES E. VINTURELLA, ESQ.
For the Claimant

ALAN G. BRACKETT, ESQ.
For the Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Charles J. Washington (Claimant) against Con Agra, Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of

Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on October 6, 1999 in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered eleven (11) exhibits while Employer proffered eight (8) exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from Claimant and Employer on December 17, 1999 and December 20, 1999, respectively. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on October 29, 1997.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on October 29, 1997.

5. That Employer filed Notices of Controversion on January 19, 1998, July 6, 1998 and March 22, 1999.

6. That Claimant received temporary total disability benefits from October 30, 1997 through December 6, 1998 at a weekly compensation rate of $486.76.

7. That Claimant's average weekly wage at the time of injury was $730.14.

8. That medical benefits for Claimant have been paid pursuant

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; and Employer Exhibits: EX-___; and Joint Exhibit: JX-___.

to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. Nature and extent of Claimant's disability.

2. Date of maximum medical improvement.

3. Whether the light duty work offered by Employer constituted suitable alternative employment.

4. Whether any other suitable alternative jobs were identified.

5. Whether Claimant is entitled to chiropractic expenses and treatment.

III. STATEMENT OF THE CASE

Testimonial Evidence

Claimant

Claimant, who was 51 years old at the time of the hearing, currently resides in Lutcher, Louisiana. (Tr. 72). He has an eleventh grade education and never received his GED. (Tr. 73). Claimant testified he has worked for Employer for 19 years as a bargeman, tractor operator, "dinky" operator and gantry operator. (Tr. 73-74). He has also worked for other employers as a laborer, tack welder and carpenter helper. (Tr. 74).

Claimant testified that on October 29, 1997, he was embarking from the barge on which he was working when he slipped on some grain and struck the "lower back of his head." He has since experienced constant pain in his lower back and legs. (Tr. 74-75). Claimant was taken to the emergency room, at which time he was x-rayed and prescribed pain medication. (Tr. 75-76). He was also treated by Employer's physician, Dr. Turner, who restricted him from working and referred him for an orthopaedic consult with Dr. Cazale. (Tr. 76). Claimant testified Dr. Cazale also restricted him from working. Id.

Claimant additionally treated with Dr. Murphy, an orthopaedic surgeon, who prescribed physical therapy and medication and administered cortizone injections for pain, which Claimant claimed

helped minimally. (Tr. 76-77). He further testified that he treated with Dr. Murphy in 1990 and 1991 for five months for lower back and neck injuries sustained in a car accident. (Tr. 77). As a result of the 1990 injury, he remained off work for about one year, but eventually returned to his usual employment doing heavy manual labor with no physical restrictions. (Tr. 78, 81).

Claimant has also treated with Dr. Richoux, a psychiatrist, for anxiety and depression. (Tr. 79). He had previously treated with a psychiatrist once in 1980 for an anxiety and/or depression problem, but did not seek further treatment until the 1997 accident. (Tr. 80).

He testified that he currently uses a TENS unit to help relieve his back pain. (Tr. 80-81). Since the October 1997 accident, Claimant attempted to return to light duty work on three occasions. (Tr. 81). In October 1997, Claimant was employed as a bargeman operator, which involved operating a bobcat, removing and replacing covers from barges and being responsible for cleaning the dock. (Tr. 81-82, 86). He explained that his duties involved walking,[2] a lot of bending, stooping and crouching. (Tr. 87).

Following the October 1997 accident, Claimant returned to his regular duties as a bargeman in August 1998. Id. He stated that running the tractor aggravated his back condition because of the "vibration in the bobcat" and "jumping and jerking movements." (Tr. 89-90). He worked for about one and a half hours before the pain was so intense that he "barely could straighten up." (Tr. 90). Claimant subsequently reported to the control room supervisor and went to St. James Hospital Emergency Room, where he received a shot and pain medication. (Tr. 90-91). He also sought treatment with Dr. Murphy for this aggravation. (Tr. 91).

Claimant attempted to return to modified work in October 1998 as a bin deck sweeper in the grain silos. (Tr. 91-92). He explained the physical requirements involved bending and reaching. (Tr. 92). Claimant swept for about one and a half hours before he began experiencing pain. (Tr. 93). Subsequently, he took a break for about 15 minutes. Id. He attempted to return to his duties,

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[2] Claimant testified that the duties of a bargeman operator required him to walk from the control room to the job site where the barge was located. He estimated this distance to be approximately 240-250 yards, of which the first 75 yards is on an incline and the last 60 yards is on a decline. (Tr. 82). He claimed that prior to the accident, it took him about six or seven minutes to complete the walk; whereas after the accident, the walk took him 10-12 minutes. (Tr. 83).

but hurt too much. Id. Claimant took some pain medication, took another 15-20 minute break and returned to work. (Tr. 94). He worked for another hour and a half before quitting because of the pain. Id. He testified that while working in the silos, nothing was provided to him on which he could sit during his breaks. (Tr. 95). Claimant reported to the St. James Hospital Emergency Room again and was administered a shot and prescribed pain medication. Id. He followed up with Dr. Murphy for this aggravation. (Tr. 96).

Claimant attempted to return to modified work with Employer a third time on December 11, 1998 as a gantry operator. Id. He explained this position requires constant standing while running the gantry and that seating accommodations are not provided. Id. He also stated that he was required to bend and lean, the extent of which depended on the stage of the river. (Tr. 98-99). Claimant claimed that leaning over aggravated his back condition. (Tr. 99). He worked approximately two and a half hours before reporting pain to his plant manager. Id. Claimant testified that on that day, he did not receive authorization from Employer to seek medical treatment at the emergency room. (Tr. 100). Claimant subsequently sought medical treatment on his own from Dr. Waguespack, his family physician, who gave him a shot and pain medication. (Tr. 101). He did not believe he could perform his entire shift due to pain. Id.

Additionally, Claimant testified he worked as a Peco operator on a part-time basis prior to his work injury. (Tr. 102). The physical requirements involved walking and climbing stairs and ladders. Id. The primary duties involved loading and unloading ships. Id. Claimant "would not sign for the job" when a position became available because he felt the physical requirements exceeded his capabilities. (Tr. 103). Claimant further testified he worked as a railcar unloader at one time. (Tr. 103-104). Based on his previous experience with the physical requirements of this position, Claimant does not feel he could perform the duties of this job. (Tr. 106).

Claimant does not believe he can return to his former employment as a bargeman or gantry operator. (Tr. 106). He testified he "wants to work" in order "to support my family." (Tr. 107). He stated that he sought medical treatment from a chiropractor, Dr. Dale, for his back. Id. Claimant believed the first visit was free and testified that the treatment has not been paid for by Employer. Id.

On cross-examination, Claimant testified that he missed passing the GED by one point, but never re-took the test. (Tr. 108). Claimant admitted that walking 240-250 yards to report to

his duties as a bargeman does not bother his back. (Tr. 109). He explained that the constant standing and bending causes him pain. Id. Claimant claimed that walking up and down stairs causes him pain, but he continues to engage in this activity. (Tr. 110).

He admitted that when he worked as a sweeper in the silo, he was told to work at his own pace. (Tr. 110). He did not recall being told that a chair would be provided to him to sit on during breaks, nor did he recall being told to sweep only in open areas. Id. Claimant testified that as a gantry operator, the bending and constant standing caused problems. (Tr. 112).

Claimant admitted that he did not seek authorization from Employer for chiropractic treatment by Dr. Dale. (Tr. 113). He also admitted that no physician ever referred him to a chiropractor. Id. Claimant has not sought any further employment since the accident and has not looked for any additional jobs because he wants his old job back. (Tr. 114). He stated that he can work the controls of the railcar for the unloader position if another worker "broke the seals and opened the car." (Tr. 115).

On re-direct examination, Claimant testified that it was his understanding the sweeper position required bending and reaching. (Tr. 116).

Leo Smith

Mr. Smith, who worked with Claimant for about 18 years, is currently employed as a bargeman operator by Employer. (Tr. 19). He estimated the walk from the control room to the barge job site to be about 200-225 yards. (Tr. 20-21). He also stated that climbing stairs or ladders was an integral part of reaching the job site. (Tr. 22).

Mr. Smith was aware that Claimant was injured on the job on October 29, 1997. (Tr. 25). He recalled working with Claimant twice following the work accident. Id. Mr. Smith testified that in August 1998, he and Claimant were working as operators on a barge and recalled that Claimant had to leave due to back pain after working "a couple of hours or so." (Tr. 26-27). He further testified that prior to the work accident, he worked with Claimant and never observed him exhibiting difficulties in performing the job duties of a bargeman. (Tr. 27). He stated Claimant was a good and reliable worker. (Tr. 28).

John P. Madere

Mr. Madere, who worked with Claimant on and off for about ten

years, is currently employed as a bargeman operator with Employer. (Tr. 34). Prior to the October 29, 1997 accident, Mr. Madere did not hear Claimant complain of back problems or any other problems which physically prevented him from performing his job duties as a bargeman. (Tr. 35). He estimated the walk from the control room to the job site to be about 240 yards. (Tr. 37). He also stated that the physical job requirements involved climbing ladders one to seven times per day, uncovering cover barges, pulling cables, tying ropes and dealing with hooks and chains. (Tr. 38, 40). He further explained that bargemen unload products, such as grain, wheat, corn and soybeans, with a marine leg. (Tr. 40).

Mr. Madere testified that the railcar unloader position involves stooping, pulling, bending and kneeling. (Tr. 41-42). He further stated that these tasks are performed continuously on each railcar containing three "hoppers" which need to be opened with a prybar. (Tr. 42). With respect to the sweeper position, he testified that it is necessary to reach under the grain belts to sweep. (Tr. 43). Mr. Madere claimed there are places to sit if an employee needs to sit down, such as on a stairwell, I-beam or concrete block. Id. He has performed both the railcar unloader and sweeper job duties.

Mr. Madere has worked as a gantry operator previously and testified that the physical requirements involved constant flexing at the waist and looking over the ledge for safety checks. (Tr. 44-45). When Claimant returned to work following the accident, Mr. Madere did not work with him. (Tr. 47).

On cross-examination, Mr. Madere testified that he never discussed with Claimant any difficulties he may have had after returning to work following the accident. (Tr. 49).

Sam Thomas

Mr. Thomas, who worked with Claimant for three years, is currently employed with Employer as a marine leg operator. (Tr. 52). Prior to the October 1997 work accident, Mr. Thomas never observed Claimant exhibiting difficulties performing his job duties, nor did he ever hear Claimant complain of any physical limitations. (Tr. 53). He claimed Claimant was a good and dependable worker. Id. He estimated the walk from the control room to the job site was about 1/8 of a mile. (Tr. 54). Mr. Thomas stated employees must climb stairs and vertical ladders to get to the barge. (Tr. 56). He further testified there is not much "break time" while working a shift. (Tr. 58).

Mr. Thomas performed the sweeper duties for about two years and claimed that the physical requirements involved a lot of bending, stooping and reaching. (Tr. 59). He stated that there were no chairs for employees to sit on during breaks. (Tr. 60). He has also performed the duties of the railcar unloader, which he explained involved reaching and crouching in order to unlatch the hopper. (Tr. 60-61). He estimated the prybar used to unlatch the hopper weighed anywhere from 5-20 pounds. (Tr. 61-62).

Mr. Thomas also has performed the gantry operator position duties, which involved a lot of vibratory and jerking motions. (Tr. 64). He explained this position requires constant standing, frequent bending and allows for minimal breaks after completing a barge. (Tr. 65). Following the accident, Mr. Thomas worked with Claimant once in August 1998. Id. He observed that Claimant worked for about an hour, but did not know why he left. (Tr. 66).

Troy Sullivan, Jr.

Mr. Sullivan is currently employed as the plant superintendent for Employer's river location, St. Elmo Terminal. (Tr. 122). He explained that Employer is a union facility and that there is a collective bargaining agreement. (Tr. 123). Furthermore, he stated Claimant ranked as seniority number 9 out of approximately 38 workers. Id. Mr. Sullivan testified that preference is given to seniority in bidding for jobs. Id.

Mr. Sullivan explained the point system and company policies regarding tardiness and attendance. (Tr. 124-125). He stated that the attendance policy is a "ten-day no-fault system, by which an employee can accumulate ten points during the year." (Tr. 125). He further explained that after receiving ten points, employees are terminated. Id. On December 28, 1998, Claimant's record reached ten points and he was terminated from his employment. (Tr. 126-127).

Claimant was contacted by Mr. Sullivan on May 22, 1998 regarding re-employment with Employer via a "callback letter." (Tr. 127). Mr. Sullivan testified Claimant did not respond to the letter about the job opening. (Tr. 128). Another job opening, a millwright position, became available in July 1998 and Claimant was offered an opportunity to bid on that job, but Mr. Sullivan did not receive a response. Id. Mr. Sullivan testified that in August 1998, he reviewed the results of Claimant's functional capacity evaluation and determined Claimant could return to work as a bargeman. (Tr. 128-129). He issued Claimant a "callback letter" on August 6, 1998. (Tr. 129).

Mr. Sullivan testified that upon returning to work as a bargeman, Claimant worked approximately three and a half hours before leaving. Id. Claimant informed Robert Lauman, the supervisor, that he would not be able to complete working that day. Id. Mr. Sullivan did not speak with Claimant at all regarding why he left work or if he wanted to return to work in any position. (Tr. 130).

Due to approval by Dr. Murphy of certain light duty tasks, Mr. Sullivan issued another "callback letter" to Claimant on October 6, 1998 for the position of light duty sweeper. (Tr. 130). He testified that he chose the basement of the grain storage silos for Claimant to work in because it was level and flat, dry and had large surfaces with light dust and scattered grain. (Tr. 131). Mr. Sullivan believed this position was the "easiest way to reintroduce [Claimant] into a light duty position." Id. He personally instructed Claimant to sweep only in open areas and walkways and to "only do what he was physically capable of doing." (Tr. 133). Mr. Sullivan specifically told Claimant to not "bend and pull from underneath the belts." Id. He further testified that he offered Claimant a chair after he worked one and a half hours. (Tr. 134). He also claimed Claimant worked about five hours, after which Claimant told him that he did not think he could continue working the job because his back was hurting. Id.

Mr. Sullivan testified that the sweeper position is the lightest duty job at Employer's facility, except for clerical staff positions in the front office. (Tr. 135). Claimant did not attempt to contact Mr. Sullivan again regarding the sweeper position. Id.

Based on Dr. Murphy's approval, Mr. Sullivan issued another callback letter on December 9, 1998 to Claimant regarding the gantry operator position. Id. Claimant reported to work on December 11, 1998 and worked for about two and a half hours before stopping. (Tr. 136). Claimant has not returned to work since December 11, 1998. (Tr. 142). Thereafter, Claimant began accumulating points under the company policy, "no-call, no-show," and was subsequently terminated. Id.

Mr. Sullivan did not recall Claimant returning to the facility to explain why he never returned to work. (Tr. 143). Additionally, Mr. Sullivan was never presented with a doctor's note excusing Claimant from work. Id. The first time Mr. Sullivan reviewed a physician's document regarding Claimant's condition and limitations was at a grievance meeting in March 1999. Id. Mr. Sullivan testified he never received a report from Dr. Murphy stating Claimant could not perform the gantry operator position.

Id. He further stated Claimant is still eligible to work for Employer if he presented a doctor's release setting forth physical limitations. (Tr. 143-144). Mr. Sullivan stated that if Claimant returned to work, the gantry operator, sweeper and railcar unloader positions would be available. (Tr. 144).

Mr. Sullivan additionally testified that Claimant was informed via certified letter that a Peco operator position became available in September 1999. (Tr. 144-145). Claimant did not respond to the letter. Id. With respect to the railcar unloader position which involved frequent bending, Mr. Sullivan stated that this physical requirement could be modified for Claimant. (Tr. 146). He testified Claimant is welcome to return to work at any time and added that his physical limitations would be accommodated. (Tr. 148).

On cross-examination, Mr. Sullivan admitted that a letter was never sent to Claimant stating that Employer will accommodate him if he obtains a list of physical restrictions from his physician. (Tr. 151). He testified that Claimant was offered a full duty position in May 1998 based on the release to work by Dr. Steiner, who was not Claimant's treating physician. (Tr. 153). Mr. Sullivan further admitted that he was not aware that Claimant had been restricted to light duty work by Dr. Murphy at the time he was offered the opportunity to bid for the millwright position, which was not considered light duty. (Tr. 155-156).

With respect to the bargeman position, Mr. Sullivan testified that the results of Claimant's FCE "did not show anything that would keep [Claimant] from doing the job." (Tr. 157). He further admitted that he was not aware of any restrictions placed on the bargeman position by Dr. Murphy. (Tr. 163). If Dr. Murphy restricted Claimant from performing the duties of a bargeman, Mr. Sullivan would not recommend the job as appropriate for Claimant. (Tr. 166). Mr. Sullivan believed Ms. Seyler's descriptions of the jobs were complete summaries of the duties to be performed. (Tr. 177).

Mr. Sullivan testified that he did not offer a chair to Claimant while he was sweeping until Claimant had complained of back pain. (Tr. 177). He explained that although he did not provide Claimant with a chair, there were other places in the silo basement where Claimant could have sat. (Tr. 178). He also testified that as a railcar unloader, an employee unloads about 48-50 cars per shift and that each car contains three hoppers. (Tr. 179).

Medical Evidence

J. Turner, M.D.

Dr. Turner, Employer's physician, examined Claimant on October 30, 1997 and diagnosed a severe lumbar strain. (CX-9, p. 1). He prescribed medication and restricted Claimant from driving, lifting, pushing and carrying objects. Id. He opined Claimant should engage in sedentary work only, if at all. Id.

John Cazale, M.D.

Dr. Cazale, an orthopaedist, treated Claimant based on the referral from the St. James Hospital Emergency Room on November 3, 1997. (CX-8, p. 1). Upon physical examination, Dr. Cazale diagnosed Claimant with a lumbar strain. (CX-8, p. 2). He recommended bed rest, moist heat application and physical therapy. Id. Claimant was prescribed pain medication. Id.

George A. Murphy, M.D.

Dr. Murphy, who was accepted as an expert in the field of orthopaedic surgery, testified at the hearing on behalf of Claimant. He first examined Claimant on November 6, 1997 for the work accident of October 29, 1997. (Tr. 184; CX-2, p. 1). On that date, Claimant presented with lower back pain and radiating pain in both thighs. (Tr. 185; CX-2, p. 1). Physical examination revealed severe muscle spasm in the lower back and scoliosis in the lower spine, which Dr. Murphy opined was secondary to the spasm. Id. Additionally, x-rays indicated lumbar scoliosis, early degenerative disc disease and some change at the L3 level. Id. At that time, Dr. Murphy recommended an MRI, which was performed on November 12, 1997 and revealed mild to moderate hypertrophic degenerative changes of the lower lumbar facet joints. (Tr. 186; CX-2, p. 1). No bulging, herniations or fractures were seen. Id. Dr. Murphy opined that the work accident was traumatic enough to cause the degenerative changes to become symptomatic. (Tr. 187). He believed Claimant's condition would be benefitted by conservative treatment, namely physical therapy. (Tr. 187).

When Claimant returned on December 31, 1997, Dr. Murphy recommended nerve conduction studies and an EMG be performed. (Tr. 187; CX-2, p. 4). These diagnostic tests resulted normally. (Tr. 188; CX-2, p. 5). Claimant was re-evaluated on April 20, 1998, at which time no significant change in condition was noted. (CX-2, p. 6). On July 20, 1998, Dr. Murphy recommended Claimant should engage in light duty work. (Tr. 189; CX-2, p. 7).

On August 10, 1998, Dr. Murphy noted that Claimant attempted to return to his duties as a bargeman and began experiencing pain as a result. Id. Consequently, Dr. Murphy felt Claimant should work light duty for at least a month before attempting to increase his duty status. (Tr. 190; CX-2, p. 7). He further testified that on September 21, 1998, Claimant reported Employer was not going to allow him to work light duty. Id. On October 15, 1998, Dr. Murphy noted Claimant attempted to return to a lighter duty type job, but also experienced pain as a result. (Tr. 190-191; CX-2, p. 7). He recommended a bone scan. Id. Dr. Murphy further testified that according to the history given, the sweeper position aggravated Claimant's condition. (Tr. 191).

Dr. Murphy re-examined Claimant on October 19, 1998, at which time he opined Claimant could continue to work light duty, but "will need to be able to sit approximately half the time he is at work." (CX-2, p. 8). Dr. Murphy's November 5, 1998 notes report that the bone scan revealed only early generalized arthritis and no other significant change in Claimant's condition. Id. Claimant returned on December 10, 1998 complaining of a lot of discomfort and pain. Dr. Murphy stated that Claimant may continue to work light duty. Id.

Dr. Murphy's December 14, 1998 notes acknowledged Claimant's third attempt to return to work as a gantry operator. (Tr. 191; CX-2, p. 8). He believed a vocational consult was necessary to identify the exact duties of this position. (CX-2, p. 8). Based on Claimant's complaints, Dr. Murphy opined that the gantry operator work exacerbated or aggravated his prior back condition. (Tr. 192). Dr. Murphy testified Claimant reported back pain and radicular leg pain on January 28, 1999, which he attributed to the arthritic condition of Claimant's back. (Tr. 193; CX-2, p. 9). Claimant experienced another flare-up of pain in April 1999 and was given a cortizone shot. Id. On May 6, 1999, Claimant presented to Dr. Murphy in a very emotional state and was recommended to consult a psychiatrist. (Tr. 193-194; CX-2, p. 9). When Dr. Murphy evaluated Claimant on August 10, 1999, his condition had not significantly changed, but it was noted that he had seen Dr. Richoux who placed him on medication. (Tr. 194-195). Dr. Murphy approved the following positions as suitable for Claimant: sweeper, railcar unloader and gantry operator.[3] (CX-2, pp. 13-20). He

[3] The descriptions of these positions were sent to Dr. Murphy for approval or disapproval by Rebecca Daniels, senior claims examiner. Upon reviewing the description, Dr. Murphy wrote "no" on the bargeman position description, but wrote "yes" on the sweeper, railcar unloader and gantry operator position descriptions. (CX-2, pp. 12-20).

opined the bargeman position was not appropriate for Claimant. (CX-2, p. 12).

Dr. Murphy testified that the repeat MRI which was performed on April 3, 1998 showed some mild degenerative changes, but no herniation. (Tr. 195). He opined that Claimant's back problems were caused by the October 29, 1997 accident. Id. His final diagnosis of Claimant's condition consisted of a lumbar strain which aggravated pre-existing degenerative lumbar disease. (Tr. 196). Dr. Murphy testified that Claimant's condition is chronic and he does not expect any quick or sudden improvement in the near future. Id. He estimated Claimant had a 5% whole body impairment rating. (Tr. 197).

Moreover, Dr. Murphy permanently restricted Claimant from repetitive bending, stooping and climbing because these activities would aggravate Claimant's condition. (Tr. 198). He would not restrict Claimant from climbing a vertical ladder, if he had to climb only four steps once or twice per day. (Tr. 199). Dr. Murphy explained that if climbing the ladder was an essential function of the job which Claimant would have to perform several times, he would restrict him from performing that activity. Id. He recommended continuing conservative treatment for Claimant. (Tr. 200). Dr. Murphy also opined Claimant reached maximum medical improvement in "June or July 1998." Id. He further added that extended walking might irritate Claimant's back. (Tr. 204).

Dr. Murphy testified that he restricted Claimant from performing the bargeman duties on May 14, 1999. (Tr. 205). Prior to that time, he had not been provided with any job descriptions for the alternate positions. Id. With respect to the sweeper position, Dr. Murphy testified that if repetitive bending was not required, Claimant could perform the duties. (Tr. 206). He also recommended that Claimant be allowed to alternate sitting and standing in this position. Id.

Additionally, Dr. Murphy testified that if Claimant were required to bend frequently at the waist while performing the gantry operator's duties, it might aggravate his condition. (Tr. 211). He understood the physical requirements to include alternate sitting and would restrict Claimant from performing this job if he was required to continually stand. (Tr. 212). He also believed the jerking motion associated with operating the bobcat would aggravate Claimant's back. (Tr. 213).

On cross-examination, Dr. Murphy reaffirmed Claimant had a lumbar strain. (Tr. 214). He explained that Claimant's spasm gradually diminished during the course of treatment. Id. Dr.

Murphy testified that the MRI results were consistent with Claimant's age and work history. (Tr. 215). He stated that based on Claimant's improvement, he released him to return to light duty work with certain physical restrictions on May 18, 1998. Id. The permanent restrictions included no heavy lifting over 50 pounds and no frequent bending or repetitive climbing of ladders. (Tr. 216-217). He opined that if Claimant bent occasionally at a ten degree angle, his condition would probably not be aggravated. (Tr. 217).

Dr. Murphy stated that when Claimant returned in August 1998, October 1998 and December 1998, there was no objective change in his physical condition. (Tr. 219). He testified that the sweeper position was appropriate as long as Claimant had the ability to occasionally sit down, change positions and was required to sweep only in open areas. (Tr. 221). With these limitations, Dr. Murphy opined Claimant could work a full day. (Tr. 222).

With respect to the gantry operator position, Dr. Murphy opined Claimant could operate a hose, depending on the size of the hose and the pressure of the water. (Tr. 223). He also stated that if Claimant operated the offloading controls for the railcar unloader position and was allowed to alternate sitting and standing, this job would be appropriate. (Tr. 223-224). He further opined that if Claimant were given an opportunity to work at his own pace, take breaks when needed and allowed to sit and stand alternately, the jobs described, other than the bargeman position, would be appropriate. (Tr. 224). Dr. Murphy testified that Claimant could stand for a half-hour at a time before breaking. (Tr. 225).

On re-direct examination, Dr. Murphy testified that if the gantry operator position involved frequent or constant jerking motions while operating the controls, this might aggravate Claimant's condition. (Tr. 226). He believed Claimant has been reasonable and consistent in exhibiting his complaints and symptomatology. (Tr. 230). He further stated that Claimant was legitimately depressed and emotionally upset over his injury and resulting disability. (Tr. 231).

On re-cross examination, Dr. Murphy deferred analysis and determination of Claimant's psychiatric condition to a psychiatrist. (Tr. 231).

In response to the undersigned's questions, Dr. Murphy testified that he reviewed Dr. Steiner's May 8, 1998 report which concluded that no objective evidence existed to confirm Claimant's injury. (Tr. 232). He explained that Claimant suffered from degenerative disc disease, which is a progressive condition based

on the aging process. Id. Dr. Murphy testified that degeneration is a permanent condition and can never revert back to normal. (Tr. 234).

Robert A. Steiner, M.D.

Dr. Steiner, a board-certified orthopaedic surgeon, initially evaluated Claimant at the behest of Employer on May 8, 1998, at which time Claimant reported low back pain and radicular pain in the hips and thighs. (EX-1, p. 1). Dr. Steiner opined Claimant sustained a lumbar strain attributable to the October 29, 1997 work accident. (EX-1, p. 3). He noted, however, that the physical examination did not reveal any objective evidence of a permanent injury. Id. Dr. Steiner saw "no reason why [Claimant] cannot return to work." Id.

On June 19, 1998, Dr. Steiner reviewed the results of the FCE performed by Dr. Bunch. (EX-1, p. 4). Based on the previous examination and the results of the FCE, Dr. Steiner maintained his opinion that Claimant could return to his regular work. Id.

Claimant returned to Dr. Steiner on October 7, 1998, at which time he complained of back pain, radicular leg pain and leg numbness and weakness. (EX-1, p. 5). Dr. Steiner noted no significant change in Claimant's condition since the initial examination and reaffirmed that Claimant could return to his regular full duty work. (EX-1, p. 6).

On July 16, 1999, Dr. Steiner approved the following positions as within Claimant's physical capabilities: bargeman; sweeper; railcar unloader; and gantry crane operator. (EX-1, p. 10).

Robert L. Mimeles, M.D.

Dr. Mimeles, a board-certified orthopaedic surgeon, initially evaluated Claimant at the behest of Employer on February 24, 1999, at which time Claimant complained of back and leg pain. (EX-2, p. 1). Physical examination revealed 50% restricted back motion and difficulty bending side to side. Id. He further noted subjective complaints of "pain with light pressure on the skin" which Dr. Mimeles reported as "somewhat suspect." (EX-2, p. 2). Straight leg raising tests while Claimant was sitting were normal, but in the supine position produced back pain complaints. Id. Dr. Mimeles stated there were inconsistencies in the examination and opined that in three or four months, Claimant can return to his former employment. Id.

On July 26, 1999, Dr. Mimeles clarified his opinion by stating that if Claimant does return to work, he would restrict the amount of bending, stooping and lifting required. (EX-2, p. 3). Dr. Mimeles based these restrictions on Claimant's age, not his work accident of October 29, 1997. Id.

Robert R. Dale, D.C.

Dr. Dale, a chiropractor, examined Claimant once on March 2, 1999. (CX-3, p. 1). Upon examination, Dr. Dale diagnosed Claimant with lumbar IVD syndrome, cervicalgia, cephalgia, thoracic myofascitis, muscle spasm and myalgia. Id. No fractures were seen on x-ray, nor were any suspected. Id. He recommended ultrasound treatment to reduce the muscle and tendinitis and interferrential electrotherapy to reduce pain and swelling as well as passive motion and flexion traction in the lumbar spine. (CX-3, p. 2). He did not expect any permanent disability to exist. Id.

Richard W. Richoux, M.D.

Dr. Richoux, a psychiatrist, evaluated Claimant on June 29, 1998. (CX-1, p. 1). He opined that as a direct result of Claimant's chronic pain, physical limitations with activities and adverse alterations in life circumstances associated with his work-related injury, Claimant suffers from major depression with significant anxiety. Id. Dr. Richoux recommended and prescribed anti-depressant medication and supportive psychotherapy for an indefinite duration. Id.

Rennie W. Culver, M.D., Ph.D.

Dr. Culver, a board-certified psychiatrist and neurologist, initially examined Claimant based on the referral by Employer's attorney for an independent psychiatric evaluation on August 31, 1999. (EX-3, p. 1). After reviewing all physician's medical reports and interviewing Claimant, Dr. Culver concluded Claimant's complaints are greatly disproportionate to the objective clinical findings, which he noted were "essentially non-existent." (EX-3, p. 11). He opined Claimant suffered from either Somatoform pain disorder[4] or is malingering. Id. Dr. Culver further agreed with Dr. Richoux that Claimant is depressed and anxious, but attributed these conditions to "severe family stressors," not the work injury. (EX-3, pp. 12-13). He further opined that "it is hard to relate [Claimant's] psychiatric condition to his occupational injury given

[4] Dr. Culver explained that Somatoform is a pain disorder associated with psychological factors.

the virtually unanimous opinions of the physicians who have evaluated and/or treated him following that injury." (EX-3, p. 13). Finally, he stated that it is "entirely possible [Claimant] is consciously exaggerating his complaints in the context of a legal claim." Id.

Richard W. Bunch, Ph.D., P.T.

Dr. Bunch performed an FCE on Claimant on June 19, 1998. (EX-4, p. 1). Upon review of the results of the FCE, Dr. Bunch failed to find any objective physiological signs to support the subjective complaints of Claimant. Id. Furthermore, he noted that tests for maximum, consistent volitional efforts and non-organic signs were positive for inappropriate illness behavior. Id. Dr. Bunch opined Claimant did not exert maximum effort. Id.

Functional capacity testing results **estimated** Claimant should be able to safely perform work based on an 8-12 hour day which does not exceed light physical demand labor with the following restrictions: limited material handling; no sustained or repetitive work posture involving back flexion, kneeling, squatting, jumping and climbing. (EX-4, p. 2). Finally, Dr. Bunch concluded that based upon his findings, Claimant is not able or willing to return to his former employment without the aforementioned restrictions being implemented. Id.

Vocational Evidence

Carla D. Seyler

Ms. Seyler, who was accepted as an expert in the field of vocational rehabilitation and job placement, testified that she was retained by Employer on January 6, 1999 to review the jobs available at Employer's facility in St. Elmo. (Tr. 235). She reviewed the following positions: gantry operator; sweeper; railcar unloader; and bargeman. (Tr. 235-236). Ms. Seyler explained that she visited each position's job site, observed the duties being performed, spoke with Employer's representatives and visited similar places of employment. (Tr. 236). She testified that she sent a description of the duties of each position to Drs. Murphy, Steiner and Mimeles. (Tr. 240). Ms. Seyler further stated that Drs. Steiner and Mimeles approved the three light duty positions (gantry operator, sweeper and railcar unloader) in July 1999. Id. She added that Dr. Mimeles recommended restricting stooping, bending and lifting when Claimant first returned to work. Id.

Ms. Seyler testified the railcar unloader position involved alternate standing and sitting in an upholstered seat. (Tr. 241).

During observation, she noted that employees did not bend to a height of 18 inches or lower or "even higher than a hundred fifty times during a shift." Id. She also noted the job involved very slight vibration while unloading the cars. Id. Ms. Seyler agreed that the occasional bending involved was at approximately a ten degree angle. (Tr. 244). Based on the foregoing, Ms. Seyler opined this position constituted suitable alternative employment for Claimant. (Tr. 245).

She also testified that the sweeper position constituted suitable alternative employment for Claimant. Id. She explained that the sweeping duties take place in very open areas. She further stated that to reach the bin deck, employees can take an elevator. Id.

Ms. Seyler testified that she performed an evaluation of Claimant, which consisted of administering tests and obtaining his educational and employment history. (Tr. 246). Claimant scored the following grade level equivalents in these subjects: reading comprehension - 7.6; letter/word identification - 9.7; calculation - 7.0; and applied problems - 10.1. Id. She rated Claimant's basic skills as "fair to good." (Tr. 247). Ms. Seyler opined Claimant would be employable outside of Employer's facility at the following types of jobs: unarmed security guard; bridge tender; auto parts representative; sandwich maker; and weigh station attendant. Id. She claimed that these types of positions are available with "some regularity and frequency" and generally pay between $5.50 and $7.00 per hour. (Tr. 248-249). When she met with Claimant, he indicated that he did not attempt to secure employment anywhere else because he did not believe he could. (Tr. 249).

On cross-examination, Ms. Seyler testified she was never asked to provide a labor market survey report to Claimant. (Tr. 251). She further explained that because Claimant had been released to return to work with Employer, she was not asked to provide job placement services. Id. She testified she was asked to identify Claimant's wage earning capacity outside Employer's facility. Id.

With respect to the railcar unloader position, Ms. Seyler testified that the bending requirements were not constant, but rather, occasional. (Tr. 252-253). She further testified that the gantry crane's start-up, movement and stop consisted of minimal or slight vibration. (Tr. 253). She agreed with Dr. Murphy's recommendation that Claimant be provided with a chair to sit on while performing the sweeper duties. (Tr. 254). Ms. Seyler testified that the Department of Labor classified the sweeper and gantry operator positions as light duty and the bargeman position

as medium to heavy duty. (Tr. 256).

On re-direct examination, Ms. Seyler opined Claimant was employable in specifically the gantry operator, railcar unloader and sweeper positions. (Tr. 257). She reaffirmed that these positions were approved by physicians. Id.

The Contentions of the Parties

Claimant argues that based on the testimonial and medical evidence of record, he is unable to return to his former employment as a bargeman and has thus established a prima facie case of total disability. It is further contended that although Claimant diligently attempted to return to work on three separate occasions following his work injury, none of the positions available to him constituted suitable alternative employment since the physical requirements exceeded his limitations and restrictions. Therefore, Claimant maintains he is entitled to disability compensation benefits from the date of injury and continuing through present.

Employer, on the other hand, contends that no objective medical evidence exists which precludes Claimant from returning to his full regular duties as a bargeman. Alternatively, it is argued that Claimant can return to modified work. Employer also maintains Claimant was not diligent in seeking to return to gainful employment and, thus, should not be entitled to any disability compensation benefits.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. V. Vozzolo, Inc. v. Britton, 377 F. 2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford

Accident & Indemnity Co. v. Bruce, 661 F. 2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Nature and Extent of Disability

The parties stipulated that Claimant suffered from a compensable injury on October 29, 1997 when he slipped on some grain and injured his back. However, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra., at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F. 2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F. 2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or

usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

B. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, ftn 5. (1985); Trask v. Lockheed Shipbuilding Construction Co., supra.; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

As noted hereinabove, it is undisputed that Claimant injured his back when he slipped on grain and fell. The date Claimant reached maximum medical improvement is at issue. In light of the medical evidence of record, in particular Dr. Murphy's opinion, I find and conclude that Claimant reached maximum medical improvement with respect to his back condition on June 30, 1998.

Dr. Murphy began treating Claimant on November 6, 1997 for the October 29, 1997 work injury and continues to treat him presently. Based upon his treatment of Claimant over the past three years, Dr. Murphy opined Claimant reached maximum medical improvement with respect to his back condition in June or July 1998. He further opined that Claimant could not return to his former position as a bargeman. Upon review of the other job positions identified and analyzed by Ms. Seyler, Dr. Murphy approved the sweeper, railcar

unloader and gantry crane operator positions.

Dr. Steiner evaluated Claimant three times in 1998. When Claimant was initially examined by him on May 8, 1998, Dr. Steiner opined Claimant reached maximum medical improvement on that date. He also believed Claimant was fully capable of returning to his regular work as a bargeman with no physical restrictions.

Claimant was also evaluated by Dr. Mimeles once on February 24, 1999. Upon physical examination, Dr. Mimeles opined that Claimant would be able to return to his former employment as a bargeman in about "three or four months." No specific date of maximum medical improvement is given.[5]

In light of the medical evidence of record presented by the parties, I find the medical opinion of Dr. Murphy most persuasive and well-reasoned in establishing that Claimant reached maximum medical improvement in June or July 1998. Since Dr. Murphy failed to specify an exact date on which Claimant may have reached maximum medical improvement, I find June 30, 1998, the half-way period between June and July 1998, to be an appropriate date for finding Claimant reached maximum medical improvement. It should be noted that the undersigned placed more probative weight on Dr. Murphy's opinion regarding maximum medical improvement than the opinions of Drs. Steiner and Mimeles, since Dr. Murphy was Claimant's treating physician and evaluated and examined Claimant more frequently and more thoroughly over time than Drs. Steiner and Mimeles.

Accordingly, I find and conclude Claimant reached maximum medical improvement on June 30, 1998. Thus, all periods of disability prior to June 30, 1998 are considered temporary under the Act. Therefore, Claimant's condition became temporary and total from October 29, 1997, the date of injury, through June 30, 1998, the date he reached maximum medical improvement. Thus, Claimant is entitled to temporary total disability compensation benefits, based on his average weekly wage of $730.14 and a corresponding compensation rate of $486.78 ($730.14 x 66⅔% = $486.78).

Thereafter, Claimant's condition became permanent. Dr. Murphy assigned a 5% whole body impairment rating to Claimant and opined that he could **not** return to his former employment as a bargeman based on the physical requirements of the duties to be performed.

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[5] It should be noted that in brief, Employer claims that Dr. Mimeles found Claimant reached maximum medical improvement on February 28, 1998.

He placed the following permanent restrictions on Claimant: ability to alternate sitting and standing; no repetitive bending; no stooping; no heavy lifting over 50 pounds; and no frequent or extensive climbing of vertical ladders or stairs. Dr. Steiner, on the other hand, stated Claimant's condition did not indicate any objective evidence of permanent injury and saw "no reason why [Claimant] cannot return to [full duty] work." Finally, Dr. Mimeles opined that Claimant can return to his former employment as a bargeman in about three or four months following the February 24, 1999 examination. He further opined that if Claimant did return to work, he should limit his amount of bending, stooping and lifting activities.

With respect to the nature of Claimant's disability, I place more probative weight on the opinion of Dr. Murphy, Claimant's treating physician, whose medical opinions I found more cogent, well-reasoned and convincing than Drs. Steiner and Mimeles. Thus, because Claimant was unable to return to his former employment as a bargeman after reaching maximum medical improvement on June 30, 1998, based on Dr. Murphy's persuasive medical opinion, I find that he has established a prima facie case of total disability from June 30, 1998 and continuing thereafter, since suitable alternative employment was not established. Thus, Claimant is entitled to permanent total disability compensation benefits from July 1, 1998 and continuing through present, based on his average weekly wage of $730.14 and a corresponding compensation rate of $486.78 ($730.14 x 66⅔% = $486.78).

C. Suitable Alternative Employment

If the claimant is successful in establishing a prima facie case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F. 2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Turner, Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F. 2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F. 2d 1039 (5th Cir. 1992). However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane, 930 F. 2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F. 2d at 1042-1043; P & M Crane, 930 F. 2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F. 2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F. 2d 1003 (5th Cir. 1978).

In the present matter, I find Employer failed to establish suitable alternative employment for the reasons explicated more thoroughly hereinbelow. It should be noted that although no labor market surveys were performed by Ms. Seyler, Employer provided Claimant with four different job positions following the October 29, 1997 work injury which were evaluated and analyzed by Ms. Seyler on February 12, 1999: bargeman; sweeper; railcar unloader; and gantry crane operator.

The bargeman position, Claimant's former work, was not approved by Dr. Murphy. In fact, Dr. Murphy restricted Claimant from returning to his former employment. Although Drs. Steiner and Mimeles opined that Claimant could return to his usual work as a bargeman, I accord greater probative weight to the opinion of Dr. Murphy, since he treated Claimant more frequently and thoroughly over time, than Drs. Steiner and Mimeles. Additionally, he restricted Claimant from engaging in heavy duty work and

recommended Claimant perform only light duty. Thus, because Dr. Murphy prohibited Claimant from returning to his former work as a bargeman, I find and conclude this position, which was classified as medium to heavy labor, does not constitute suitable alternative employment.

The sweeper position involved sweeping dust and excess grain from the floor surface of the bin deck, scale house, dock or other locations within the grain elevator. (EX-5, p. 25). The physical requirements include standing and using the upper extremity to sweep. Id. Workers may take breaks as needed and may sit while doing so. Id. No bending, stooping, climbing, squatting, overhead reaching or crawling are required. Id. Additionally, it was noted that employees were not required to bend to sweep underneath or outside belts or low portions of the elevator. Id. Mr. Madere, an employee, testified that this position involves reaching under the grain belts to sweep. (Tr. 43). Mr. Thomas, who worked as a sweeper for about two years, claimed the physical requirements involved a lot of bending, stooping and reaching. (Tr. 59). Mr. Sullivan, the plant superintendent, modified this position to accommodate Claimant's physical capabilities. For example, he instructed Claimant to sweep only in open areas and walkways and to not bend and sweep under the grain belts. (Tr 133).

The railcar unloader position involved operating controls to unload individual railcar hoppers. Additionally, railcar unloaders are required to sweep grain or dust from the floor into a pit below the railcars. (EX-5, p. 22). Physical requirements include: walking approximately 250 yards to the job site;[6] using the right upper extremity to handle controls; ability to alternate sitting and standing; occasional lifting requirements not to exceed 15-20 pounds; occasional climbing from 3-6 feet; bending at waist once per hour; and ability to communicate verbally. (EX-5, p. 23). Unloaders sit in an upholstered chair on the track mobile while operating controls. Id. If engaged in sweeping duties, employees are required to stand and use the right upper extremity to sweep grain, dust and other particles into the pit below the railcar. Id.

It should also be noted that Mr. Madere testified that the railcar unloader position involved continuous stooping, pulling, bending and kneeling. (Tr. 41-42). Mr. Thomas, who previously worked as a railcar unloader, testified that the position involved reaching and crouching in order to unlatch the hopper cars. (Tr. 60-61). Mr. Sullivan testified the frequent bending requirements

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[6] Claimant credibly testified that walking to the job site does not cause him pain or discomfort.

for this position could be modified to fit within Claimant's limitations. (Tr 146). He further explained that about 150 hoppers were unloaded per shift. (Tr. 179).

The gantry crane operator position involved operating the controls of the gantry crane to lift and move barge covers during the unloading process. (EX-5, p. 19). The physical demands of the job include: walking approximately 250 yards and climbing two sets of metal grate steps (about 60 steps total) to reach the job site; standing for about 20-30 minutes during uncovering process; using upper extremities to operate controls; and slight bending at waist and knee while releasing brake of crane. Id. It was noted that the entire uncovering or covering process lasts about 30 minutes per barge. Id. It was estimated that approximately six barges were "completed" during a shift. Id.

Mr. Madere testified that the gantry crane operator position involved constant flexing at the waist for safety checks. (Tr. 44-45). Mr. Thomas, who also worked as a gantry crane operator, stated this position involved a lot of vibratory and jerking motions; constant standing, frequent bending and allowed for minimal breaks. (Tr. 64-65).

Based on Messrs. Madere and Thomas' testimony whom I credit, the descriptions of the positions provided by Ms. Seyler and the restrictions placed on Claimant by Dr. Murphy, in particular no frequent or repetitive bending, I find that the sweeper, railcar unloader and gantry crane operator positions do not constitute suitable alternative employment since each position required constant or repetitive bending.

However, it should be noted that Mr. Sullivan credibly testified that the job descriptions provided by Ms. Seyler in the job analyses report were accurate and complete. He also testified that **Employer is willing to accommodate Claimant's physical restrictions within any position identified to accommodate Claimant**. Nevertheless, since Employer failed to set forth the appropriate and proper accommodations for the positions in order that they comport with Claimant's physical capabilities, I find that suitable alternative employment has not yet been established. If any of the foregoing identified positions are offered to Claimant with appropriate accommodations that conform to his physical limitations and restrictions, Claimant's disability may then convert to a permanent partial disability status or no disability status. See Sproull, supra. In that event, if Claimant were paid the wages of the identified positions, he would not suffer a loss of wage earning capacity effective the date of an offer of accommodated employment by Employer.

On May 14, 1999, Dr. Murphy approved the sweeper, railcar unloader and gantry crane operator positions, based upon Ms. Seyler's specific descriptions of the duties to be performed as set forth in the job analyses report. Furthermore, Drs. Steiner and Mimeles found that each of these positions fell within Claimant's physical capabilities. In addition, Ms. Seyler testified at the hearing that she believed Claimant was physically and functionally capable of performing the sweeper, railcar unloader and gantry crane operator jobs. (Tr. 257). However, since the specific accommodations within which Claimant could have performed the duties of each job were not explicated thoroughly and in detail, I find that the positions do not constitute suitable alternative employment.

It should further be noted that I do not find that suitable alternative employment was established by Drs. Murphy,[7] Steiner and Mimeles' approval of the sweeper, railcar unloader and gantry crane operator positions. Although Claimant performed the duties of the identified positions in May 1998 (bargeman), October 1998 (sweeper) and December 1998 (gantry crane operator), except the railcar unloader, it is clear that during that time period, Claimant exceeded the physical demands and duties of each position because he had to seek medical treatment from Dr. Murphy after engaging in such work. For example, Claimant testified that he bent to sweep underneath belts in the grain silo. However, Mr. Sullivan credibly testified that he specifically instructed Claimant to not bend, but rather to sweep only in open areas. Additionally, the job description states that bending is not required. Moreover, Claimant sought medical attention after performing each position for approximately one to three hours, claiming that the activities aggravated his condition. Dr. Murphy agreed with Claimant that the activities performed during these time periods caused him pain and discomfort. Based on the foregoing, I find suitable alternative employment was not established on an earlier date, i.e., on the dates the jobs became available to Claimant or on the dates he

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[7] Dr. Murphy testified if Claimant was allowed to alternate sitting and standing and did not have to engage in repetitive bending, he could perform the sweeper position. (Tr. 206). If Claimant had to bend three times per railcar, 150 times per shift, opening a hopper, the railcar unloader position would not be appropriate. (Tr. 209). Additionally, he stated that if Claimant were required to bend frequently at the waist and had to continuously stand with no opportunity to sit while performing the gantry operator's duties, the position may not be appropriate. (Tr. 211). He further believed the jerking motions associated with operating the bobcat would aggravate Claimant's condition. (Tr. 213).

attempted to actually perform the duties of the jobs, since he was clearly exceeding his physical limitations in performing the duties.

Employer states in brief that Ms. Seyler performed a vocational evaluation for additional alternative employment, in which she identified numerous jobs for Claimant. She identified the following positions: unarmed security guard; bridge tender; auto parts representative; sandwich maker; and weigh station attendant. (Tr. 247). She further testified that these positions are within Claimant's physical capabilities, vocational skills and geographic area and pay between $5.50-$7.00 per hour. Id.

With respect to this "labor market survey," which is not contained in the record, Ms. Seyler failed to determine whether each potential employer, which she does not identify, would have considered Claimant, in particular, for employment. She further failed to address the physical and functional demands of each job vis-a-vis Claimant's limitations. I find these non-specific job openings fail to document the physical and functional requirements and demands of the work to be performed. As noted hereinabove, the precise nature and details of job opportunities must be established to allow a rational determination of its suitability and realistic availability. These general positions fail to denote **any** requirement whatsoever. Additionally, Ms. Seyler does not even specify the name of each potential employer and fails to denote with specificity the actual duties to be performed, although she claimed each position fell within Claimant's physical capabilities. Accordingly, I reject each of these general positions identified as suitable alternative employment because of a lack of specificity upon which a rational decision can be made.

Thus, because suitable alternative employment was not established, Claimant's condition became permanent and total. Therefore, he is entitled to permanent total disability compensation benefits from July 1, 1998 and continuing through present, based on his average weekly wage of $730.14 and a corresponding compensation rate of $486.78 ($730.14 x 66⅔% = $486.78).

Claimant acknowledged that he engaged in **no** job searches for alternative employment because he wanted to return to his former job. (Tr. 114).

D. Chiropractic Benefits

Pursuant to Section 7(a) of the Act, the employer is liable for all medical expenses which are the natural and unavoidable

result of the work injury. In order for Employer to be liable for Claimant's medical expenses, the expenses must be reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255 (1984). Section 7 does not require that an injury be economically disabling in order for Claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.

Additionally, the claimant has the right to choose an attending physician authorized by the Secretary to provide the required medical care. The Secretary is required to actively supervise the medical care provided and to receive periodic reports about it. The Secretary, through the District Director, has the authority to determine the necessity, character and sufficiency of present and future medical care, and may order a change of physicians or hospitals if the Secretary deems it desirable or necessary to the claimant's interest, either on the director's own initiative, or at the employer's request.

Under Section 7(b) and (c), the employer bears the burden of establishing that physicians who treated an injured worker were not authorized to provide treatment under the Act. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986). Additionally, the employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. Slattery Assocs. v. Lloyd, 725 F.2d 780, 787 (D.C. Cir. 1984); Swain v. Bath Iron Works Corp., 14 BRBS 657, 664 (1982). Moreover, an employee cannot receive reimbursement for medical expenses under Section 7(d)(1) unless he has first requested authorization, **prior to obtaining treatment**, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982).

In the present matter, Claimant is seeking payment of chiropractic treatment by Dr. Dale, who evaluated Claimant once on March 9, 1999. (CX-3). It should be noted that Dr. Dale was not Employer's choice of physician, nor was Claimant referred to him by another physician. Rather, Claimant sought treatment from Dr. Dale on his own accord and without any authorization from Employer.

Currently jurisprudence does not demonstrate that retroactive authorization can occur, but rather requires authorization for medical treatment to occur **before** visiting a physician, except in

cases of emergency or refusal/neglect. In the present case, Claimant chose chiropractic treatment from Dr. Dale on his own accord. Dr. Murphy had been treating Claimant for the October 29, 1997 work injury and such treatment was authorized and paid for by Employer. The facts in this case do not indicate that at the time Claimant sought treatment from Dr. Dale that such treatment was on an emergency basis, since he was concurrently treating with Dr. Murphy. Moreover, at no time prior to beginning treatment with Dr. Dale did Employer refuse or neglect to provide medical treatment. In fact, Claimant was receiving medical treatment from Dr. Murphy, which was being paid for by Employer.

Therefore, based upon the facts presented and in light of the foregoing jurisprudence, I conclude that Employer is not liable for the chiropractic treatment of Claimant by Dr. Dale because Claimant failed to receive proper authorization for such treatment from Employer or the Department of Labor before being treated by him.

Furthermore, chiropractic treatment is reimbursable only to the extent that it consists of manual manipulation of the spine to correct a subluxation shown by an x-ray or clinical findings. See 20 C.F.R. § 702.404.

In the present matter, there is no evidence in Dr. Dale's records that his treatment consisted of manual manipulation of Claimant's spine to correct a subluxation. In fact, Dr. Dale noted that there was nothing indicated or suspected on Claimant's x-rays. Accordingly, under this federal regulation, I find the chiropractic treatment in this case is not reimbursable and thus Employer is not liable for such expenses.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States

Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for temporary total disability from October 29, 1997 to June 30, 1998, based on Claimant's average weekly wage of $730.14 in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer shall pay Claimant compensation for permanent total disability from July 1, 1998 and continuing through present, based on Claimant's average weekly wage of $730.14, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C § 908(a).

3. Employer shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 1998, for the applicable period of permanent total disability.

4. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's October 29, 1997 work injury, excluding chiropractic expenses consistent with this decision, pursuant to the provisions of Section 7 of the Act.

5. Employer shall receive credit for all compensation heretofore paid, as and when paid.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 12th day of May, 2000, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge